Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1992

SHEET METAL WORKERS UNION LOCAL 38 INSURANCE AND WELFARE FUND; SHEET METAL WORKERS UNION LOCAL 38 PENSION FUND; SHEET METAL WORKERS UNION LOCAL 38 VACATION FUND; SHEET METAL WORKERS UNION LOCAL 38 ANNUITY FUND; WILLIAM R. PAGANO, As Participant, Beneficiary and Trustee of Sheet Metal Workers Union Local 38 Insurance and Welfare Fund, Pension Fund, Vacation Fund, and Annuity Fund,

Petitioners,

-against-

AETNA CASUALTY AND SURETY COMPANY,

Respondent.

AETNA CASUALTY AND SURETY COMPANY,

Third-Party Plaintiff,

-against-

MARTIN J. SCHWIMMER, MARIO RENDA, JOSEPH DeCARLO, SR. and FIRST UNITED FUNDS, LTD.,

Third-Party Defendants.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Do the provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq. ("ERISA") supersede the contractual provisions of a fidelity bond required by ERISA?

II. Should the parties to a fidelity bond issued pursuant to the requirements of ERISA be allowed to contract out of the otherwise applicable limitations period?

III. What is the statute of limitations for a claim made on a fidelity bond required by ERISA?

PARTIES

In addition to the parties whose names appear in the caption, a copy of the summons and complaint were served, as required by 29 U.S.C. §1132(h), on the Secretary of Labor and the Secretary of the Treasury, neither of whom has intervened in the action.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

SHEET METAL WORKERS UNION LOCAL 38 INSURANCE AND WELFARE FUND; SHEET METAL WORKERS UNION LOCAL 38 PENSION FUND; SHEET METAL WORKERS UNION LOCAL 38 VACATION FUND; SHEET METAL WORKERS UNION LOCAL 38 ANNUITY FUND; WILLIAM R. PAGANO, As Participant, Beneficiary and Trustee of Sheet Metal Workers Union Local 38 Insurance and Welfare Fund, Pension Fund, Vacation Fund, and Annuity Fund,

Petitioners,

- against -

AETNA CASUALTY AND SURETY COMPANY,

Respondent.

AETNA CASUALTY AND SURETY COMPANY

Third-Party Plaintiff,

- against -

MARTIN J. SCHWIMMER, MARIO RENDA, JOSEPH DeCARLO, SR. and FIRST UNITED FUNDS, LTD.,

Third-Party Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the summary judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 28, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, annexed hereto as "Appendix A", was issued as a summary order and, pursuant to Local Rule 0.23 of that Court, will not be officially reported. The opinion of the United States District Court for the Southern District of New York (Broderick, J.) is not officially reported and appears as Appendix B hereto at 4a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit, dated May 29, 1992 was entered on May 28, 1992.

Petitioner invokes the jurisdiction of the Supreme Court under 28 U.S.C. §1254 (1).

STATUTES INVOLVED

The case involves §412 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1112, which requires ERISA fiduciaries to be bonded, and the statutes of limitations that are contained in ERISA §§413 and 1303(f)(5), 29 U.S.C. §§1113 and 1451(f)(5). The text of these statutory sections is set out in the Appendix.

The decision below applied New York law which, under New York Civil Practice Law and Rules (McKinney's) §201, allows the parties to agree in writing to shorten the otherwise applicable state law statute of limitations. That state statutory period would in this case be the six-year period for breach of contract claims contained in New York Civil Practice Law and Rules (McKinney's) §213(2). The text of these statutory sections is also set out in the Appendix.

STATEMENT OF THE CASE

The issue here directly affects every benefit plan subject to ERISA: whether the protections mandated by the requirement of ERISA §412, 29 U.S.C. §1112, that all plan fiduciaries be

bonded, can be subverted by a contract between the bonded fiduciaries and the surety which shortens the time within which to commence an action on the bond to less than the time otherwise allowed under the applicable statute.

The Court of Appeals for the Second Circuit, by affirming the opinion of the District Court that the parties to an ERISA-mandated fidelity bond could contract out of the statute and could enforce the shorter limitations period contained in a standard form insurance company bond, diminished the protections intended by ERISA for every plan subject to that statute. By allowing the very fiduciaries whose actions are being bonded to contract with a bonding company in such a way as to decrease the protections mandated by ERISA, the Court of Appeals jeopardized the protections

granted by ERISA against breach of fiduciary duty.

If the parties to an ERISA-mandated fidelity bond can shorten the time for bringing suit on the bond, the parties are subjecting the protections provided by ERISA to the terms of a standard form adhesion contract and are, in effect, amending the statute.

Since every ERISA plan has a fidelity bond, typically a standard form insurance company bond that contains a short limitations period, the issue here is important to the beneficiaries of every benefit plan subject to ERISA.

A. Jurisdiction in the Prior Proceedings

The District Court had jurisdiction pursuant to 28 U.S.C. §§1331 and 1352 because this is an action pursuant to 29

U.S.C. §§1113 and 1132 for payment under a bond required by 29 U.S.C. §1112.

The District Court also had diversity jurisdiction pursuant to 28 U.S.C. §1332(a) because plaintiffs are citizens of New York and defendant is a citizen is of Connecticut.

The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291.

B. Nature of the Case

This is an action by Petitioners ("the Funds") for payment under a fidelity bond ("the Bond") for losses suffered as a result of breach of fiduciary duty by the investment advisor to the Funds, Martin J. Schwimmer ("Schwimmer"). The Funds are multi-employer benefit plans, as that term is defined in ERISA.

As a result of criminal activity of Schwimmer, the Funds suffered losses of at least $3,877,170.85 under the Bond, for which the Funds made a claim to the bonding company, The Aetna Casualty and Surety Company ("Aetna"), which failed to pay the claim.

C. **Course of Proceedings**

The Funds commenced this action on the Bond against Aetna on November 29, 1989. Aetna served an answer and an amended answer that denied coverage and asserted affirmative defenses. Aetna also filed a third party complaint asserting indemnity claims against Schwimmer, Mario Renda ("Renda") and Joseph DeCarlo, Sr., who were individuals associated with Schwimmer, and against entities with which they were associated,

namely, First United Fund, Ltd. and First United Financial Corp.

By order dated April 8, 1991, the District Court for the Southern District of New York (Broderick, J.) granted Aetna's motion for summary judgment on the ground that the action was barred by the two-year limitations period contained in the Bond. By further order of October 18, 1991, the District Court directed on the basis of its April 8, 1991 order that final judgment be entered in favor of Aetna and dismissed Aetna's third-party claim as moot. Judgment dismissing the third-party complaint was entered on October 21, 1991, and an amended judgment was entered on November 26, 1991 dismissing the complaint and third-party complaint.

The Court of Appeals for the Second Circuit in a summary order affirmed the

judgment of the District Court "substantially for the reasons set forth in Judge Broderick's order of October 18, 1991." The Court of Appeals apparently was referring to the District Court's April 8, 1991 order.

D. **Statement of Facts**

The Funds obtained the Bond pursuant to ERISA requirements that every fiduciary of an employee benefit plan and every person who handles funds or other property of such a plan be bonded in an amount to be fixed at the beginning of each fiscal year of the plan. 29 U.S.C. §1112. Schwimmer, who was the investment advisor of the Funds, was one of the individuals required by ERISA to be bonded.

On June 15, 1987, Schwimmer and Renda were indicted on various criminal offenses relating to fraud involving the

assets of the Funds and of pension and welfare funds of another union. By letter dated June 17, 1987, the Funds advised Aetna of their claim under the Bond.

In May 1988, Renda entered into a plea agreement with the Government, whereby he entered a guilty plea to certain charges against him. In October 1988, Schwimmer was convicted after a jury trial of the majority of the charges against him.

Section 8 of the Bond contains a two-year limitations period commencing when the insured discovers loss under the Bond, and a subordination of the Bond's limitations provision to any controlling statutory provision. The Bond provides in relevant part:

> No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with all the

> terms of this Policy, nor until ninety days after the required proofs of loss have been filed with the Company, nor at all unless commenced within two years from the date when the Insured discovers the loss. If any limitation of time for notice of loss or any legal proceeding herein contained is shorter than that permitted to be fixed by agreement under any statute controlling the construction of this Policy, the shortest permissible statutory limitation of time shall govern and shall supersede the time limitation herein stated.

The Court of Appeals affirmed the District Court's ruling that the Funds had discovered the loss by June 1987, approximately two years and five months before the action was commenced, and that therefore the action was barred by the two-year limitation set forth in the Bond.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS FAILED TO RECOGNIZE THE "BLACK LETTER LAW" THAT BECAUSE THE BOND WAS REQUIRED BY STATUTE, THE PROVISIONS OF THAT STATUTE ARE INCORPORATED INTO THE BOND AND SUPERSEDE ANY CONFLICTING PROVISION OF THE BOND, INCLUDING A SHORTER LIMITATIONS PERIOD.

ERISA §412 (29 U.S.C. §1112) requires that all employee benefit plans subject to ERISA, in order to protect the interests of their beneficiaries and participants, purchase a bond for fiduciaries and other persons handling funds or property of the plan. The Funds purchased the Bond to comply with ERISA, and the Bond, which was a standard form bond, made specific reference to ERISA in several endorsements.

Thus, since the Bond was required by statute, the provisions of the statute must be read into the Bond. The Bond, since required by ERISA, was subject to ERISA.

It is "black letter law" that parties to a statutory bond are presumed to have contracted in such a way as to make the statutory provisions a part thereof. An insurance policy must be read in light of such statute, particularly where the statute and the policy appear to conflict. In such a case, the statute controls over any provision of the policy, as conflicting contractual provisions are void.

> The statutory law in force and effect at the time of the issuance of a policy becomes a part of the contract as though expressly written therein, and a policy must be considered to contain those requirements.

12 Appleman, Insurance Law and Practice, §7041 at 166, 180-182; see also, American Casualty Co. of Reading, Penn. v. Irvin, 426 F.2d 647, 650 (5th Cir. 1970); Dixie v. Federal Compress & Warehouse Co., 132 F.2d 275 (8th Cir.

1942) (regulations promulgated pursuant to United States Warehouse Act, 7 U.S.C. §268).

Thus, in Hack v. American Surety Co. of New York, 96 F.2d 939 (7th Cir. 1938), cert. denied, 305 U.S. 631, 59 S.Ct. 95, 83 L.Ed.2d 405, reh. denied, 305 U.S. 671, 59 S.Ct. 145, 83 L.Ed.2d 435 (1938), the Court held that an Indiana statute requiring the bonding of bank officers became part of the bond and that the statutory limitations period prevailed over a shorter period set forth in the contract.

> [T]he statute, rather than the restricted written contract of the parties, measures the liability of the surety. . . . This also applies to the efforts of the surety to restrict its said liability by fixing a time limit within which an action must be instituted. The Indiana statute of limitations, not the shorter period specified in the

> contract, must govern the time within which an action shall be brought . . . .

96 F.2d at 944.

Under New York law (which would govern a claim under the Bond, absent ERISA), it is clear that a statutory bond must be read as subject to the statutory requirements pursuant to which it was issued. Proc v. Home Insurance Company, 17 N.Y.2d 239, 270 N.Y.S.2d 412, 217 N.E.2d 136 (1966) (statutorily mandated limitation supersedes period set forth in insurance policy); see, Fox-Knapp, Inc. v. Employees Mutual Casualty Company, 725 F. Supp. 706, 709-710 (S.D.N.Y.), affd., 893 F.2d 14 (2d Cir. 1989) (statutory limitations period supersedes one year contractual limitation in fire insurance policy); Kahn v. Lumberman's Mutual Casualty Co., 293 F. Supp. 985, 989 (E.D.N.Y. 1968) (one year statutory

limitation deemed included in binder of insurance upon which suit was brought).

For non-statutory bonds, as for other contracts, New York allows the parties to agree in writing to a shorter limitations period. New York CPLR (McKinney's) §201.

The Second Circuit erred in affirming the District Court's holding that: "[t]he fact that Aetna's policy was issued to satisfy certain statutory requirements of ERISA does not preclude the enforcement of Aetna's two-year contractual limitations period." Rather, it is precisely because "Aetna's policy was issued to satisfy certain statutory requirements of ERISA" that ERISA is incorporated into and made part of the Bond. Terms of the Bond that are in conflict with the statute are superseded.

Whether, in actions brought with

respect to a breach of fiduciary duty under ERISA, the Court should look to New York law and its six-year limitations period for breach of contract actions or, as the Funds urge, infra, look directly to ERISA for the more appropriate and uniform limitations period (here also, six years), the action was brought timely.

With respect to the bond required by ERISA, the Court of Appeals for the Ninth Circuit has stated that "ERISA law controls." Kennedy v. Allied Mutual Insurance Co., 952 F.2d 262, 264 n.2 (9th Cir. 1991). Here, however, the Second Circuit has summarily dismissed such a claim, paying no heed to the ERISA nature of the claim. This Court should speak on the matter, and correct the Second Circuit's error in affirming the District Court's order of summary judgment based

on the limitations period set forth in the Bond.

II. PARTIES TO AN ERISA-MANDATED FIDELITY BOND SHOULD NOT BE ALLOWED TO DIMINISH THE PROTECTION AFFORDED BY ERISA BY CONTRACTING OUT OF THE LIMITATIONS PERIOD APPLICABLE UNDER THE STATUTE

As set forth above, parties to a statutory bond may not contract out of the statute, and are bound by the limitations period required under the statute. The present action is apparently the first instance wherein the issue has arisen in the context of ERISA. But see, Isola v. Hutchinson, 780 F. Supp. 1299 (N.D. Cal. 1991) (pension plan participant may sue non-fiduciary insurer for performance under a bond required by ERISA).

Given the broad mandate of ERISA and the strong public policies enunciated therein, it is especially appropriate

that individuals not be allowed to circumvent or, in effect, "amend" the statute by contracting out of it.

The question simply put is whether an insurer in a contract of adhesion should be allowed to "contract" the parties out of ERISA by significantly foreshortening the period in which its own obligations may be invoked. The answer must be no where, as here, such action substantially impairs the protections which Congress intended for employee benefit recipients.

The present issue goes to the core of the protections mandated by ERISA and affects every ERISA-regulated plan. This is not an action by an individual employee for increased benefits. It is an action on behalf of multi-employer funds for the benefit of the entire employee benefits plan. The Funds seek

payment from an ERISA-mandated surety. To allow that surety to contract out of its obligations is repugnant to statutory intent.

Thus, in Central States, Southeast and Southwest Areas Pension Fund v. Aalco Express Co., 592 F. Supp. 664 (E.D. Mo. 1984), the Court refused to enforce a choice of law clause in a pension trust agreement. The Court stated that the limitations period is to be found as "a matter of federal law." The court did not reach the issue of "whether the parties to a collective bargaining agreement or a pension trust agreement can, as a matter of federal labor law, provide expressly for a particular period of limitations" Central States, supra, 592 F. Supp. at 667. Similarly, the Court in Bologna v. NMU Pension Trust of NMU Pension and Welfare Plan, 654 F.

Supp. 637 (S.D.N.Y. 1987) did not enforce a limitations period adopted by the trustees as a procedural rule. But see, Scheirer v. NMU Pension and Welfare Plan, 585 F. Supp. 76 (S.D.N.Y. 1984).

In Plazzo v. Nationwide Mut. Ins. Co., 697 F. Supp. 1437 (N.D. Ohio 1988), revd. on other grounds, 892 F.2d 79 (6th Cir. 1989) (unpublished), on a claim for employee benefits under 29 U.S.C. §1132, the court looked to Ohio law for the limitations period, but refused to enforce a contract provision that would have shortened the applicable statute of limitations, even though Ohio case law allowed parties to an insurance contract to set a shorter, reasonable limitations period.

> Those state courts which have addressed the issue of whether parties may modify a state statute of limitations by a mutually agreed upon contract provision did not reach their conclusions with

> national interests in mind. It is the duty of the federal courts to assure that the importation of state law will not interfere with or frustrate the implementation of national policies. Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 367, 97 S.Ct. 2447, 2455, 53 L.Ed.2d 402 (1977), quoting Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 465, 95 S.Ct. 1716, 1722, 44 L.Ed. 2d 295 (1965).

697 F. Supp. at 1441 Somewhat illogically, the Plazzo court might have enforced a contractual modification of the limitations period if Ohio had a statute rather than decisional law that allowed such modification. Plazzo, supra at 1441.

In analogous situations, courts have not allowed parties to contract away benefits provided by ERISA. Thus, in Seamon v. Vaughan, 921 F.2d 1217 (11th Cir. 1991), a breach of contract suit by trustees against a plan administrator, the Court held that a contractual term

precluding a claim for attorneys fees is preempted by ERISA.

Similarly, marital property settlement agreements have not been enforced as regards ERISA benefits, unless the agreement satisfies the requirements for the statutory exception as a "qualified domestic relations order" under 29 U.S.C. §1056(d)(3)(B)(i). McMillan v. Parrott, 913 F.2d 310, 312 (6th Cir.1990) (divorce decree ineffective to modify the beneficiary interest of participant's ex-wife); Lyman Lumber Co. v. Hill, 877 F.2d 692 (8th Cir. 1989) (id.). Cf. Carland v. Metropolitan Life Insurance Co., 935 F.2d 1114 (10th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 670 (1991). But see, Fox Valley and Vic. Const. Wkrs. Pension F. v. Brown, 897 F.2d 275, 280 (7th Cir.) (en banc), cert. denied, Brown, Laurine

v. Fox Valley, etc., et. al., ___ U.S. ___, 111 S.Ct. 67, 112 L.Ed.2d 41 (1990) (proper waiver in marital property settlement of interest by non-participant in a plan is not preempted by ERISA's anti-alienation provisions.)

A number of Circuits have similarly found to be unenforceable, as preempted by ERISA's requirement that pension plans be in writing, oral agreements by an employer to pay pension related benefits supplementary to those provided for under the company pension plan.[1] Smith v. Dunham-Bush, Inc., ___ F.2d ___, 1992 App. LEXIS 2945 (2d Cir. 1992); see, Cefalu v. B.F. Goodrich, Co., 871 F.2d 1290, 1297 (5th Cir. 1989); Degan v. Ford Motor Co., 869 F.2d 889, 895 (5th Cir.

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1 Informal written amendments of ERISA plans are expressly forbidden by 29 U.S.C. §1102(b)(3).

1989); Musto V. American General Corp., 861 F.2d 897, 910 (6th Cir. 1988), cert. denied, 490 U.S. 1020, 109 S.Ct. 1745, 104 L.Ed.2d 182 (1989); Straub v. Western Union Telegraph Co., 851 F.2d 1262, 1265 (10th Cir. 1988); Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986).

Clearly, statutory language and case law have allowed parties to "contract out" of the statute only in restricted circumstances, and only when the contract furthers, rather than impedes, the purposes of the statute. Bird v. Shearson Lehman/American Express, 926 F.2d 116 (2d Cir.) cert. denied, ___ U.S. __, 111 S.Ct. 2891 (1991) (agreement to arbitrate is not preempted; arbitration is not inconsistent with ERISA's purposes, and the agreement to arbitrate does not diminish rights provided in the

statute but only submits their resolution to the arbitration forum.)

Here by contrast, the Bond, by shortening the limitations period, diminishes the protection that ERISA intended for plan beneficiaries against breaches of fiduciary duty. Moreover, those beneficiaries are not even parties to the contract at issue--the Bond--whose very purpose is to protect them against the acts of those who <u>are</u> parties to the Bond, namely the fiduciaries.

How much more compelling it is, then, that parties to a contract (such as fiduciaries and insurance companies) be precluded from contracting away the protections ERISA provides to <u>non</u>-parties to the contract (such as plan beneficiaries) especially where, as here, the statutory protection is protection

against the acts of parties to the Bond, namely the fiduciaries.

III. THIS ACTION IS GOVERNED BY THE SIX-YEAR STATUTE OF LIMITATIONS IN ERISA §413, 29 U.S.C. §1113, BECAUSE THE FUNDS' CLAIM ON THE FIDELITY BOND IS A CLAIM "WITH RESPECT TO" A VIOLATION OF FIDUCIARY DUTY.

ERISA §413, 29 U.S.C. §1113, provides that the statute of limitations therein applies in two types of situations: 1) breaches of duty by a fiduciary or 2) other claims with respect to violations of fiduciary responsibility.

The statute thus clearly reaches past "fiduciary duty" to apply, by its terms, to actions "with respect to a violation of" fiduciary duty. Although most actions under 29 U.S.C. §1113 are brought against a breaching fiduciary, a claim under that statute against an issuer of a bond pursuant to 29 U.S.C.

§1112 is proper. Alleyne v. McCusker, 5 E.B.C. 1650 (C.D. Cal. 1983). See, Kennedy v. Allied Mutual Insurance Co., 952 F.2d 262 (9th Cir. 1991) supra; Isola v. Hutchinson, 780 F. Supp. 1299 (N.D. Cal. 1991), supra; Rochester Radiology Associates v. Aetna Life Ins., 616 F. Supp. 985 (W.D.N.Y. 1985).

Similarly, in Robinson v. Weir, 277 F. Supp. 581 (D. Neb. 1966), the Court held, in an action for breach of fiduciary duty under Section 501(b) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. §501(b)), that the surety bonding the fiduciary pursuant to 29 U.S.C. §502 may be joined as a defendant, so as to allow the "complete and appropriate relief" that Congress intended.

The present claim, made pursuant to an ERISA-mandated fidelity bond, is made

"with respect to [Schwimmer's] violation of" his fiduciary duty, and the claim is governed by the six-year statute of limitations set forth in ERISA §413, 29 U.S.C. §1113.

There has apparently been no previous instance in which a court has addressed the issue of the limitations period applicable to a fidelity bond required by ERISA §412, 29 U.S.C. §1112. Nor, apparently, has any court interpreted the phrase "with respect to" in ERISA §413, 29 U.S.C. §1113. But see, Wright v. Southwestern Bell Telephone Company, 925 F.2d 1288, 1290 (10th Cir. 1991)(§1113 does not apply to a claim for disability benefits. It is applicable only to actions "arising out of" violations of the portion of the Act addressing fiduciary responsibilities or claims that "involve" fiduciary

responsibilities). However, the broad mandate of ERISA, and the policy underlying both the statute in general and the specific requirement that fiduciaries be bonded all argue for an inclusive reading of the statute, so that employee benefit funds achieve the protection intended for them.

Here, the limitations period should be the same for the fidelity bond as for the underlying fiduciary breach. The insured's rights are protected, consistent with congressional intent, only if the limitation for suit on the bond is coextensive with that for suit against the bonded fiduciary. The rights embodied in both suits are part of an overall integral claim. The goal of fairly protecting the employee funds will best be met by a rule which subjects both the fidelity insurer and breaching

fiduciary to an equal period of vulnerability.

The purposes of ERISA can best be effected by finding that the Funds' claim on the Bond is a claim "with respect to" Schwimmer's breach of his fiduciary duty and hence is subject to the six-year statute of limitations contained in ERISA §413, 29 U.S.C. §1113.

IV. THE PRESENT ACTION PROVIDES THE COURT WITH AN OPPORTUNITY TO DELINEATE THE EXTENT TO WHICH THE PUBLIC POLICIES EMBODIED IN ERISA REQUIRE THAT ACTIONS BROUGHT UNDER ERISA SHOULD BE SUBJECT TO UNIFORMITY IN STATUTES OF LIMITATIONS

A. If the Court Finds no Limitations Period in ERISA That Explicitly Applies Here and Hence "Borrows" the "Most Suitable" Limitations Period From Elsewhere in Federal or State Law, That "Borrowing" Should not Allow the Parties to Contract Out of a Statutory Limitations Period

With four exceptions, ERISA does not explicitly provide a limitations period

for suits brought to enforce its provisions. The exceptions are: actions with respect to fiduciary responsibility (29 U.S.C. §1113), actions relating to termination of a single employer plan (29 U.S.C. §1370(f)), actions by or against the Pension Benefit Guaranty Corporation (29 U.S.C. §1303(e)(6), 29 U.S.C. §1303 (f)(5) and 29 U.S.C. §1368(d)(2)) and actions under the special provisions relating to multi-employer plans (29 U.S.C. §1451(f)).

The legislative history of ERISA indicates that actions brought under 29 U.S.C. §1132, ERISA's general enforcement provision, are to be regarded as arising under the laws of the United States in similar fashion as those brought under §301 of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. §301. Metropolitan Life Ins. Co. v. Taylor, 481

U.S. 58, 66, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987).

Because §301 does not itself specify a limitations period, the court's task is to "'borrow' the most suitable statute or other rule of timeliness from some other source." DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 158, 103 S.Ct. 2281, 2287, 76 L.Ed.2d 476 (1983).

The present action provides the Court, in the context of a situation that is present in every ERISA plan, an opportunity to state what limitations period must be "borrowed" and from where.

Is an action on a fidelity bond sufficiently related to an action against the bonded fiduciary as to make 29 U.S.C. §1113 directly applicable, obviating the need for "borrowing"? Or is such an action, at least in the context of multi-

employer plans, directly akin to an action by trustees for "appropriate legal or equitable relief, or both" under 29 U.S.C. §1451(a)(1), so as to make the limitations period in 29 U.S.C. §1451(f)(1) directly applicable. See, Held v. Manufacturers Hanover Leasing Corp., 912 F.2d 1197, 1201 n.4 (10th Cir. 1990).

On the other hand, if the Court is to look to state law, what is the appropriate statute of limitations? In contract actions brought under 29 U.S.C. §1132, courts have generally applied a state limitations statute, see e.g., Miles v. New York State Teamsters Conference Pension & Retirement Fund Employee Pension Benefit Plan, 698 F.2d 593 (2d Cir.), cert. denied, 464 U.S. 829, 104 S.Ct. 105, 78 L.Ed.2d 108 (1983) (New York's six-year limitations period

of CPLR §213 applied to claim by five individuals for pension benefits.) Should the Court also "borrow" a state law such as New York Civil Practice Law and Rules §201 that allows the parties to contract out of that state limitations period?

This Court has long held that a state law limitations period, much less a provision allowing that the parties to contract out of that limitations period, should not be applied if to do so would frustrate or interfere with the implementation of national policies. DelCostello, supra, 462 U.S. at 161, quoting, Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977), quoting, Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 465, 78 S.Ct. 1201, 2 L.Ed.2d 1972 (1965). DelCostello involved LMRA §301

and hence involved federal policies akin to ERISA's concerns for employees and their benefits.

However, New York's grant of authority to contracting parties to "customize" or "individualize" the limitations period, was clearly made without reference to ERISA and the national policies embodied in that statute.

The requirement that fiduciaries be bonded is for the purpose of protecting the assets of employee benefit plans. A rule that would allow those fiduciaries to contract away that protection should be found contrary to the protective mandate of ERISA.

The Court of Appeals allowed the parties here to adopt, not an explicit state statute of limitations, but a contract clause that would reduce the

uniformity factor to zero, allow an insurance company to impose whatever limitations period appears in its standard form fidelity bond, and increase potential abuses and procedural disputes in any litigation, all undermining and frustrating the prompt and efficient resolution of claims in this area of paramount federal concern.

The Court of Appeals ruling also interfered with the strong federal policy of safeguarding the financial integrity of pension funds. The federal government, specifically the Pension Benefit Guaranty Corporation, will ultimately be liable for the payment of vested benefits if a pension plan is not adequately funded and terminates. Where the choice exists, actions involving trust funds should be given a longer rather than a shorter limitations period.

Vernau v. Vic's Market, Inc., 896 F.2d 43, 45 n.3 (3rd Cir. 1990); Hawaii Carpenters v. Waiola Carpenter Shop, Inc., 823 F.2d 289, 298 (9th Cir. 1987).

Even if ERISA §413, 29 U.S.C. §1113, does not by its terms apply here, the proper procedure is to borrow the "most suitable" statute of limitations. DelCostello, supra, 462 U.S. at 158. There is nothing "suitable," in an area of overriding federal interest and broad preemption, in borrowing a contractual provision that shortens the liability period of the insurance company, especially where the contract is a standard form contract of adhesion, imposed by the insurance company or, at best, "negotiated" between the insurance company and the very fiduciaries whose conduct is being insured against.

B. The Scope of ERISA's Provisions Shows That ERISA's Mandated Uniformity and Predictability Are No Less Served by the Preemption of State Statutes of Limitation Than By the Preemption of State Law in Other Respects.

The present action further allows the Court to address the extent to which ERISA's preemption of pension law precludes borrowing a state limitations period.

The "preemption" here involved is not the preemption of a state law cause of action, but rather the equally dispositive preemption of a state law that allows contracting parties to amend ERISA.

As this Court has emphasized, "'The preemption clause is conspicuous for its breadth'. . . . Its 'deliberately expansive' language was 'designed to "establish pension plan regulation as

exclusively a federal concern."'"

Ingersoll-Rand Co. v. McClendon, ___ U.S. ___, 111 S.Ct. 478, 482, 112 L.Ed.2d 474 (1990) (citations omitted).

> . . . Section 514(a) was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefit law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government. Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries.

111 S.Ct. at 484 (citations omitted).

ERISA is a statute with "unique preemptive force." Metropolitan, supra, 481 U.S. at 65, and the Second Circuit has recently stated that, "Congress intended the statute to avert a 'patchwork scheme of [state] regulation,'" Smith v. Dunham-Bush, Inc., ___ F.2d ___, 1992 App. LEXIS 2945

(2d Cir. 1992). Accordingly, a uniform ERISA statute of limitations, reducing the disruptive potential for conflicting regulatory provisions, would advance the pervasive uniformity which Congress' preemptive mandate intended for ERISA.

In another area in which federal regulation is pervasive, viz., securities law, this Court has recently reiterated that, in certain situations, the court should impose a uniform federal limitations period. In Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, ___ U.S. __, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991), Justice Blackmun stated:

> We have recognized that a state legislature rarely enacts a limitations period with federal interests in mind, . . . and when the operation of a state limitations period would frustrate the policies embraced by the federal enactment, this Court has looked to federal law for a suitable period. . . . These departures from the state-borrowing doctrine have been motivated by this Court's conclusion that it would be

> "inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law."

111 S.Ct. at 2778. (Although seven Justices (two in dissent) agreed that there should be a uniform federal limitations period, only four Justices joined in that part of Justice Blackmun's opinion quoted above).

The same policy considerations are present here as were present in Lampf, supra. Anything less than a uniform ERISA statute of limitations for actions brought on an ERISA-required bond, would frustrate congressional intent, giving rise to the evils which Congress sought to avoid. First, pension fund members, the intended beneficiaries of the ERISA bond, could be prejudiced by contractual agreements between the insurer and the bonded fiduciary to foreshorten

limitations periods. Second, in multi-state situations, courts have to decide which state to look to for applicable law. Third, absence of a uniform ERISA limitation burdens courts with the repeated task of claim analysis and characterization in selecting one of any number of proffered state statutes of limitation as being most analogous.

ERISA should be broadly applied to preempt state limitation periods no less than state law in other respects. A fortiori, a contractual limitation, as set forth in Aetna's standard form contract of adhesion, should be rejected as incongruent with the scope and intent of ERISA.

C. The Second Circuit's Complete Disregard of the ERISA Nature of the Present Action Conflicts With Decisions in Other Circuits on-Related Issues

The Court of Appeals for the Third Circuit has applied the limitations period of ERISA §413 in cases involving issues much further removed from a breach of fiduciary duty than the present action on a fidelity bond. In Adams v. Gould, Inc., 739 F.2d 858 (3d Cir. 1984), cert. denied, 469 U.S. 1122, 105 S.Ct. 806, 83 L.Ed.2d 799 (1985), employees sought to file a second amended complaint against their union for breach of the duty of fair representation and against their employer for breach of the collective bargaining agreement.

The Third Circuit noted that for similar claims the Supreme Court in DelCostello, supra, had emphasized the desirability of a uniform national

limitations period. The Adams Court held that, where the claim against an employer is for breach of a pension agreement, the limitations period of ERISA §413, 29 U.S.C. §1113, applied, and the employees' suit was timely. The Court stated:

> Accordingly, we hold that the three-year ERISA statute of limitations applies to this suit, in spite of the fact that the vested employees' suit against Gould's is predicated on a breach of the duty of fair representation by the Union rather than on a breach of a fiduciary duty by a pension fund trustee. Thus, the suit is not time barred.

739 F.2d at 867 (emphasis added).

Similarly, in Edwards v. Wilkes-Barre Pub. Co. Pension Trust, 757 F.2d 52 (3d Cir.), cert. denied, 474 U.S. 843, 106 S.Ct. 130, 88 L.Ed.2d 107 (1985), the Third Circuit followed Adams, supra, in an employees' suit against their employer and the pension plan to compel a recalculation of pension benefits, and

applied the ERISA statute of limitations. In so doing, the Edwards Court noted that "this case, like Adams, involves the long term interests of present beneficiaries to a pension plan, not the disputed terms of a collective bargaining agreement that affects the day-to-day operation of a business." Id. at 55.

The Adams and Edwards Courts, absent a statute of limitations directly applicable to the cases before them, see, 739 F.2d at 867 and 757 F.2d at 55, based their application of the three year ERISA limitation upon an "examin[ation] [of] the relevant policies." Adams, supra, at 867. For the Third Circuit, the controlling policy involved the "long term interests of the present beneficiaries to a pension plan," Edwards, 757 F.2d at 55, rather than matters "affect[ing] the day-to-day

operations of a business." 739 F.2d at 867 and 757 F.2d at 55.

Here, no less than in Adams and Edwards, supra, the "long term interests of the present beneficiaries to a pension plan" are at issue.

This extension by the Court of Appeals for the Third Circuit, and by courts from other Circuits that have followed Adams and Edwards, supra,[2] in

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[2] See, Smith v. ABS Industries, Inc., 653 F. Supp. 94, 101 (N.D. Ohio 1986) (following Adams) (suit alleging denial of post-retirement rights to medical and life insurance timely under 29 U.S.C. §1113); Sparks v. Ryerson & Haynes, Inc., 638 F. Supp. 56, 59-61 (E.D. Mich. 1986) (following Adams) (suit alleging plan alteration by reduction of vested rights to full medical pension payments timely under 29 U.S.C. §1113); cf. Bower v. Bunker Hill Co., 675 F. Supp. 1254, 1257 (E.D. Wash. 1986) (suit for enforcement of collectively bargained rights to medical insurance timely under either state limitation or 29 U.S.C. §1113; reasoning of Adams and Sparks "is (continued...)

applying the limitations period contained in ERISA §413, 29 U.S.C. §1113, to situations other than actions brought against fiduciaries for breach of duty, furthers the policies underlying ERISA. By contrast, the Seventh Circuit declined to follow Adams in United Ind. Flight Officers v. United Airlines, 756 F.2d 1262, 1272 (7th Cir. 1985). The Court of Appeals for the Second Circuit has here similarly frustrated ERISA's policies and should be reversed.

Other Circuit Courts, while wrestling with the desirability of imposing a uniform statute of limitations, have felt restrained by

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[2](...continued)
persuasive and fully applicable here"). But see, Central States S.E. and S.W. Areas v. Kraftco, Inc., 799 F.2d 1098, 1104 n.4 (6th Cir. 1986) (Court does not reach issue of applicability of 29 U.S.C. §1113).

their earlier decisions from doing so. Thus, in Hawaii Carpenters v. Waiola Carpenter Shop, Inc., 823 F.2d 289, 297 (9th Cir. 1987), the Ninth Circuit stated that "there are strong reasons for creating a uniform federal rule governing the limitations of actions for collection of delinquent ERISA contributions--including the fact that multi-employer trust funds may cover employers operating in a number of states..." However, the Court felt constrained by its earlier decision in Trustees for Alaska Laborers - Constr. Indust. Health & Sec. Fund v. Ferrell, 812 F.2d 512 (9th Cir. 1987) to apply a state law six-year statute of limitations to a claim for unpaid employer contributions to an ERISA fund. In doing so, the Court "note[d] especially that effectuation of federal policy is not impeded by application of a

six-year statute of limitations." 823 F.2d at 298.

Similarly, the Tenth Circuit, in an action involving a claim by an employee that he was discharged to prevent him from attaining vested rights under a retirement plan, stated:

> "Although this case arguably provides the ideal context for considering whether adoption of an ERISA limitations period makes more sense than searching for an analogous state statute, we believe that inquiry is foreclosed to this panel by this circuit's decision in Trustees of the Wyoming Laborers Health & Welfare Plan v. Morgen and Oswood Constr., Co., 850 F.2d 613 (10th Cir. 1988)"

Held v. Manufacturers Hanover Leasing Corp., 912 F.2d 1197, 1200-1201 (10th Cir. 1990). See, Gray v. Greyhound Retirement and Disability Trust, 730 F. Supp. 415, 418 (M.D. Fla. 1990) (Eleventh Circuit precedent requires application of analogous state law limitations period to an employee's claim for recalculation of

pension benefits, but argument to apply 29 U.S.C. §1113 is "appealing"; cf. Robbins v. Iowa Road Builders Co., 828 F.2d 1348, 1353 n.3 (8th Cir. 1987), cert denied, Robbins v. Easter Enterprises, Inc., 487 U.S. 1234, 108 S.Ct. 2899, 101 L.Ed 2d 933 (1988) (establishment of a uniform limitations period especially desirable where, as here, the trust agreements and administration are multi-state).

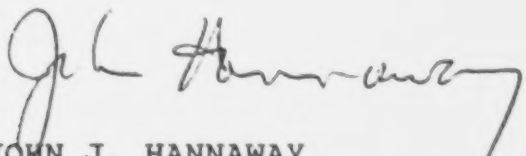
Accordingly, even absent an expressly mandated statute of limitations governing fidelity bond claims, the Court should here apply the statute of limitations in ERISA §413, 29 U.S.C. 1113, in the interest of a uniform, federal limitations period.

CONCLUSION

For the reasons herein set forth, the writ should be granted.

Dated: New York, New York
August 24, 1992

Respectfully submitted,



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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29 day of May, one thousand nine hundred and ninety-two.

P r e s e n t:

HONORABLE GEORGE C. PRATT,

HONORABLE FRANK X. ALTIMARI,
Circuit Judges,

HONORABLE DANIEL M. FRIEDMAN,
Circuit Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

Docket No. 92-7168

United States Court of Appeals
Second Court
Filed
May 28, 1992
Elaine B. Goldsmith, Clerk

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SHEET METAL WORKERS UNION LOCAL 38 INSURANCE AND WELFARE FUND; SHEET METAL WORKERS UNION LOCAL 38 PENSION FUND; SHEET METAL WORKERS UNION LOCAL 38 VACATION FUND; SHEET METAL WORKERS LOCAL 38 ANNUITY FUND; WILLIAM R. PAGANO, Participant, Beneficiary and Trustee of Sheet Metal Workers Union Local 38 Insurance and Welfare Fund, Pension Fund, Vacation Fund and Annuity Fund,

Plaintiffs-Appellants,

- against -

AETNA CASUALTY AND SURETY COMPANY,

Defendant-Appellee.

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AETNA CASUALTY AND SURETY COMPANY,

Third-Party Plaintiff,

- against -

MARTIN J. SCHWIMMER, MARIO RENDA, JOSEPH DeCARLO, SR. and FIRST UNITED FUNDS, LTD.,

Third-Party Defendants.

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This appeal from a final judgment of the United States District Court for the

Southern District of New York came on to be heard on the transcript of record and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged, and decreed that the judgment appealed from is hereby **AFFIRMED**, substantially for the reasons set forth in Judge Broderick's order of October 18,
1991.

/s/
George C. Platt, U.S.C.J.

/s/
Frank X. Altimari, U.S.C.J.

/s/
Daniel M. Friedman, U.S.C.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SHEET METAL WORKERS UNION LOCAL 38 INSURANCE AND WELFARE FUND, SHEET METAL WORKERS UNION LOCAL 38 PENSION FUND, SHEET METAL WORKERS UNION LOCAL 38 VACATION FUND, SHEET METAL WORKERS LOCAL 38 ANNUITY FUND, AND WILLIAM R. PAGANO, AS PARTICIPANT, BENEFICIARY AND TRUSTEE OF SHEET METAL WORKERS UNION LOCAL 38 INSURANCE AND WELFARE FUND, SHEET METAL WORKERS UNION LOCAL 38 PENSION FUND, SHEET METAL WORKERS UNION LOCAL 38 VACATION FUND, AND SHEET METAL WORKERS UNION LOCAL 38 ANNUITY FUND,

Plaintiffs,

- against -

THE AETNA CASUALTY AND SURETY COMPANY,

Defendant.

89 Civ. 7903(VLB)

ORDER

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THE AETNA CASUALTY AND SURETY COMPANY,

Third-Party Plaintiff,

- against -

MARTIN J. SCHWIMMER,
MARIO RENDA,
JOSEPH DeCARLO, SR. and
FIRST UNITED FUNDS, LTD.,

Third-Party Defendants.

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VINCENT L. BRODERICK, U.S.D.J.

Plaintiffs, the Sheet Metal Workers Union Local 38 Insurance and Welfare Fund, the Sheet Metal Workers Union Local 38 Pension Fund, the Sheet Metal Workers Union Local 38 Vacation Fund and the Sheet Metal Workers Union Local 38 Annuity Fund (hereinafter referred to collectively as the "Local 38 Funds") and William R. Pagano, have brought the instant action to recover from the Aetna Casualty and Surety Company ("Aetna"), pursuant to Comprehensive Dishonesty,

Disappearance and Destruction Policy - Form A, Number 74 BY 3109 BCA (the "Aetna policy"), for losses they allegedly sustained as a result of the dishonest or fraudulent acts of Martin Schwimmer ("Schwimmer").

I. Factual Summary

Aetna issued the Aetna policy to the Local 38 Funds for a policy period beginning on or about January 25, 1982 and continuing until the effective date of termination or cancellation thereof. Section 8 of the Conditions and Limitations provisions in the Aetna policy provides, inter alia, that a suit cannot be maintained against Aetna unless the action is brought within two years from the date when the Local 38 Funds discover the loss.[1]

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[1] Section 8 of the Conditions and Limitations provisions in the Aetna policy provides in pertinent part:

Schwimmer and co-defendant Mario Renda ("Renda") were indicted on June 15, 1987 of various criminal offenses relating to the investment of monies from the Local 38 Funds by a Grand Jury sitting in the United States District Court for the Eastern District of New York. A superseding indictment against Schwimmer and Renda was issued in July

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continued. . .

> No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this Policy, nor until ninety days after the required proofs of loss have been filed with the Company, nor at all unless commenced within two years from the date when the Insured discovers the loss. If any limitation of time for notice of loss or any legal proceeding herein contained is shorter than that permitted to be fixed by agreement under statute controlled the construction of this Policy, the shortest permissible statutory limitation of time shall govern and shall supersede the time limitation herein stated.

1987, and a second superseding indictment was issued in January 1988.

In a letter of June 17, 1987, Robert Carleton ("Carleton"), the fund manager of the Local 38 Funds advised Aetna of their claim for $1,000,000. This letter represents the first notice given to Aetna by the Sheet Metal Workers Funds of the claim under the Aetna Policy.

On or about May, 1988, Renda entered into a plea agreement with the government whereby he entered a guilty plea to certain charges in the second superseding indictment. On October 28, 1988 Schwimmer was convicted by a jury of the majority of the counts of the second superseding indictment.

Prior to this conviction, on October 27, 1988, the Local 38 Funds commenced a civil action against Schwimmer and Renda alleging, inter alia, violations of the

Racketeer Influenced and Corrupt Organizations Act ("RICO"). In January, 1989, the Local 38 Funds entered into a settlement of the civil RICO action against Renda.

The Local 38 Funds provided Aetna with a "proof of loss" on February 8, 1989. In this document, the Local 38 Funds detailed their losses to be $3,871,070.85 as a result of Schwimmer's dishonest acts.

Arthur N. Lambert ("Lambert"), attorney for Aetna, in a letter of June 19, 1989, to Carleton, requested certain documents for review in order to evaluate the claim made under the Aetna policy. On September 15, 1989, Lambert wrote a follow-up letter to John J. Hannaway, counsel to the Local 38 Funds requesting documents and a meeting. Both letters concluded with a paragraph reserving

Aetna's rights and defenses under the policy.[2]

On October 23, 1989 counsel and fund manager for the Local 38 Funds met with counsel from Aetna. At that time, counsel for the Local 38 Funds executed an agreement which contained a provision which recognized that Aetna still retained its rights and defenses under the policy.[3]

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[2] The letters contained the following concluding paragraph:

> Please be advised that nothing heretofore, nor contained herein, is intended as a waiver, estoppel or modification of the terms, provisions, conditions, limitations or exclusions of Aetna's policy of insurance, all of which are expressly reserved, together with such rights and defenses as are available pursuant to the policy or by law.

[3] The provision provided:

> It is agreed and understood that any action done to date or to be done subsequently by or on behalf or either the Aetna Casualty and Surety Company or

continued. . .

Plaintiffs commenced this action on or about November 29, 1989.

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Aetna has brought a motion for summary judgment to dismiss the complaint. Aetna argues that

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the Employee of Benefit Funds of Sheet Metal Workers Local 38 ("Local 38 Funds") in connection with the claim by the Local 38 Funds under Comprehensive Dishonesty, Disappearance and Destruction Policy No. 74 BY 3109 BCA for an alleged loss sustained as the result of the acts of Martin J. Schwimmer, including but not limited to any review or investigation of the claim or the facts underlying such claim, demands for or acceptance of documentation in support of the claim, meetings regarding the claim or other action relative to said claim, shall not be construed to be an admission of liability on the claim, nor shall it be construed to waive or modify any of the terms, conditions and provisions of the policy. It is further understood that any action taken relative to the claim 2hall not constitute an estoppel or waiver of any kind, nor waive, invalidate, forfeit or modify any of the rights, remedies, liabilities or defenses which either the Aetna Casualty and Surety Company or the Local 38 Funds may have with respect to the aforesaid insurance policy claim.

the summary judgment is appropriate for two reasons: first, the Local 38 Funds' action is time barred and second, the Local 38 Funds' settlement with Renda prejudiced Aetna's subrogation rights. The Local 38 Funds have crossed moved against Aetna and have requested an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting them partial summary judgment on Aetna's statute of limitations and rights of subrogation defenses.

I grant Aetna's motion for summary judgment and deny plaintiffs' motion for partial summary judgment. This action is barred by the two-year limitations period for commencing suit pursuant to Aetna's policy. I do not reach Aetna's second ground for summary judgment.

II. This action is time-barred due to plaintiffs' failure to commence this action within the two-year limitations period prescribed by Aetna's policy.

Section 8 of Aetna's policy provides, in pertinent part, "[n]o action shall lie against the Company. . . unless commenced within two years from the date when the Insured discovers the loss. . . ." The date the insured "discovers" the loss in question is critical, as it determines when the contractual limitations period begins to run.

The Second Circuit has enunciated an objective standard to determine when a fidelity loss is "discovered." Under this standard, a loss is discovered when the insured obtains facts that would cause a reasonable person to recognize that there had been dishonesty or fraud resulting in loss. Utica Mutual Ins. Co. v. Fireman's Fund Ins. Companies, 748

F.2d 118, 121-122 (2d Cir. 1984). Mere suspicions do not constitute discovery. An insured cannot disregard the known facts. Upon learning the facts comprising the alleged dishonesty, suspicions are converted to knowledge which constitutes discovery. Id. at 123 (citing Perkins v. Clinton State Bank, 593 F.2d 327, 355 (citations omitted).

Documentary evidence submitted by Aetna demonstrates that by the summer and fall of 1986, the trustees of the Local 38 Funds had extensive information concerning Schwimmer's dishonest acts. On August 6, 1985 Aetna learned that the United States Attorney's Office was conducting an investigation of the Sheet Metal Workers Local Union 38 Insurance and Welfare Fund. Special Assistant United States Attorney Bruce Maffeo, the attorney responsible for the criminal

prosecution of Schwimmer, subpoenaed the custodian of records to produce various books and records of the Sheet Metal Workers Local Union 38 Insurance and Welfare Fund. Almost eight months later, on April 29, 1986, the Local 38 Funds were apprised that the United States Attorney's Office was conducting a criminal investigation involving possible violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1962 et. seq. The fund administrator, Carleton was subpoenaed by Special Assistant United States Attorney Bruce Maffeo to testify before the Grand Jury on May 8, 1986.

Throughout this period of time, at the board of trustee meetings for the Local 38 Funds, the trustees discussed Schwimmer's investment practices and repeatedly requested explanations from

him with respect to the investments he made and the commissions he received on behalf of the Local 38 Funds. At the board of trustees meetings for the Local 38 Funds held on July 21, 1986 and on July 29, 1986, counsel for the Local 38 Funds demanded that Schwimmer provide a letter describing his relationship with "all brokers and other intermediaries with which he is associated," in order to verify his compliance with a recent Department of Labor ("DOL") technical release.

Schwimmer's relationships with intermediaries were discussed at the meeting of the trustees of the Sheet Metal Workers Pension and Annuity Funds held on September 16, 1986. During that meeting, Schwimmer indicated that he was not in violation of the DOL's technical release and agreed to bring copies of the

actual contracts between him and the intermediaries for the trustees to review. On the same day, Schwimmer sent a letter to the trustees of the Local 38 Funds, purporting to confirm that his relation-ship with one intermediary, First United Fund, was in compliance with the terms of DOL's Technical Release 86-1.

The minutes of a joint meeting of the boards of trustees of the Local 38 Funds, held on October 6, 1986, reveal that the trustees were acutely aware of the criminal investigation of Schwimmer; many of them had been subpoenaed by the United States Attorney's Office. The minutes demonstrate that the trustees extensively discussed Schwimmer's handling of the Local 38 Funds investments.

At a meeting of the trustees of the

Sheet Metal Workers Pension and Annuity Funds held on December 18, 1986 the trustees again discussed Schwimmer's investment practices and relationships with intermediaries. At that meeting they requested a written statement setting forth Schwimmer's relationship with First United Fund.

Plaintiffs' awareness of the criminal investigation being conducted by the United States Attorney's Office, and the repeated requests by their trustees for information and assurances from Schwimmer, indicate that they had notice of Schwimmer's irregular acts with respect to the investment of the Local 38 Funds. The Grand Jury indictment of Schwimmer and Renda on June 15, 1987 was icing on the cake. The events during the summer and fall of 1986 coupled with the indictment in June of 1987 would have

caused a reasonable person to recognize that a loss occurred because of Schwimmer's dishonesty. At any rate, and even if none of the foregoing sparked plaintiffs' duty to inquire, see Security Mutual Ins. Co. of New York v. Acker-Fitzsimons Corp., 31 N.Y.2d 436, 441, 340 N.Y.S. 2d 902, 906 (1972), under the objective standard enunciated by the Second Circuit, the latest possible date upon which plaintiffs may be deemed to have discovered that alleged loss was June 17, 1987, the day the Local 38 Funds administrator notified Aetna of the alleged loss.

The Local 38 Funds attempt to defeat Aetna's summary judgment motion by arguing: 1) that a material issue of fact exists; 2) that the Employee Retirement Income Security Act of 1974, as amended ("ERISA") supplies the applicable statute

of limitations period; and 3) that Aetna waived, or is estopped from asserting, the contractual limitations period. I am not persuaded by any of these arguments.

The Local 38 Funds argue that there exists a material issue of fact as to when they had knowledge of the loss caused by Schwimmer's dishonesty. Funds administrator Carleton stated in his affidavit that neither he nor any of the trustees had any knowledge of Schwimmer's dishonesty in June, 1987" . . . apart from knowledge of the existence of the indictment." This statement is controverted by the documents submitted by the Aetna which show that the trustees and the administrator of the Local 38 Funds knew of the criminal investigations being conducted by the United States Attorney's Office. The trustees, on numerous occasions prior to June of 1987,

requested verification from Schwimmer of his practices and of the types of investments he was making in behalf of the Local 38 Funds. Thus Carleton's bare assertion is insufficient to raise a triable issue of fact as to when the alleged loss in question was discovered. Plaintiffs cannot rely upon mere surmise and conjecture to defeat a summary judgment motion. See Knight v. United States Fire Insurance Co., 804 F.2d 9, 11 (2d Cir. 1986), cert. denied, 480 U.S. 932 (1987).

The Local 38 Funds assert that Aetna's fidelity insurance policy is governed by the limitations period set forth in Section 413 of ERISA, 29 U.S.C. Section 1113, because it was issued to fulfill the requirements of section 412 of ERISA, 29 U.S.C. §1112. There is no merit to this argument.

Plaintiff incorrectly attempts to apply the limitations period set forth in section 413. The limitations periods prescribed in this section relate only to actions alleging " . . . a fiduciary's breach of any responsibility, duty or obligation under this part, or with respect to a violation of this part...." In the instant case, the Local 38 Funds seek to enforce Aetna's alleged contractual obligation to indemnify the Sheet Metal Workers Funds pursuant to an insurance policy. For ERISA section 413 to be applicable, the Local 38 Funds would have to allege a breach of duty by a fiduciary or a violation of Part 4 of ERISA, 29 U.S.C. §1101, et seq.

Section 412 of ERISA, 29 U.S.C. §1112, requires bonding of every fiduciary and of every person who handles the funds or other property of an

employee benefit plan. This statute does not prescribe a limitations period for suits to enforce provisions of fidelity bonds issued to ERISA benefit plans. The fact that Aetna's policy was issued to satisfy certain statutory requirements of ERISA does not preclude the enforcement of Aetna's two-year contractual limitations period.

The Local 38 Funds also claim that the two-year limitations period should not govern because Aetna has waived, or is estopped from raising, the limitations defense. The Local 38 Funds waiver/estoppel argument rests on the fact that Aetna did not communicate with the Local 38 Funds until after the expiration of the contractual limitations period, four months after receiving proof of loss.

For the Local 38 Funds to prevail on

their waiver/estoppel argument they must show: 1) that Aetna intentionally waived its contractual limitations period; and 2) that Aetna intentionally lulled the Local 38 Funds into inactivity. See Fox-Knapp Inc. v. Employers Mut. Cas. Co., 725 F. Supp. 706 (S.D.N.Y. 1989), aff'd, 893 F.2d 14 (2d Cir. 1989); Gilbert-Frank Corp. v. Federal Insurance Co., 70 N.Y.2d 966, 968, 525 N.Y.S.2d 793, 795, 520 N.E.2d 512, 514 (1988).

The Local 38 Funds cannot meet these requirements and thus cannot prevail on their waiver/estoppel argument. The argument is inconsistent with the non-waiver agreement executed by the plaintiffs' counsel on October 23, 1989 which specifically acknowledged that any acts done by Aetna to review the Local 38 Funds' claim, either before or after the date of the agreement, did not constitute

a waiver or estoppel which would preclude Aetna from asserting the two-year limitations period in section 8 of the Aetna policy.

Under case law an insurer's investigation of a claim pursuant to a non-waiver agreement does not provide the basis for arguing that waiver or estoppel precludes the enforcement of the contractual limitations period in an insurance policy. Blitman Const. Corp. v. Ins. Co. of North America, 66 N.Y.2d 820, 498 N.Y.S.2d 349, 489 N.E.2d 236 (1985). See also Arkin-Medo Corp. v. St. Paul Fire and Marine Ins. Co., 585 F. Supp. 11 (E.D.N.Y. 1982), aff'd, 724 F.2d 1430 (2d Cir, 1983).

Even in the absence of a non-waiver agreement, the New York courts have repeatedly held that an insurer does not waive, and is not estopped from

asserting, the limitations period agreed to in an insurance contract. Gilbert-Frank Corp., 70 N.Y.2d at 968. In Gilbert the Court of Appeals noted that "[e]vidence of communications or settlement negotiations between an insured and its insurer either before or after expiration of a limitations period contained in a policy is not, without more, sufficient to prove waiver or estoppel. . . ." Id.

The Local 38 Funds have not shown that Aetna intended to relinquish the protection of the two-year contractual limitation. On the contrary, through letters and an agreement Aetna has demonstrated its interest in reserving all its rights and defenses under the policy. Furthermore, the facts do not demonstrate that Aetna's conduct lulled plaintiffs into sleeping on their rights.

That Aetna did not contact the Local 38 Funds' counsel until after the expiration of the two-year limitations period does not constitute waiver or estoppel. See Kahn v. Lumbermens Mutual Cas. Co., 293 F. Supp. 985, 989 (E.D.N.Y. 1968) (the insurer's failure to communicate with the insured during the four months between the time that the insured filed proof of loss and the expiration of the contractual limitations period did not give rise to waiver or estoppel); Soltex Thread Co., Inc. v. Rueff Bros., Inc., 111 A.D. 2d 84, 489 N.Y.S.2d 210 (1st Dept. 1985) (the insurer's failure to communicate at all with the insured between the date of the loss and the date that suit was commenced did not constitute the basis for waiver and estoppel).

The fact that Aetna corresponded

with and met with the Local 38 Funds' counsel and reviewed their documents after the expiration of the two-year limitations period also does not constitute waiver or estoppel. See, e.g., Fox-Knapp, Inc., 725 F.Supp at 711; Issa v. Reliance Ins. Co. of New York, 683 F. Supp 82, 83 (S.D.N.Y. 1988) (Mere investigation of a claim pursuant to an insurance contract is a legally insufficient predicate upon which to permit an inference of waiver of a contractual limitations period); Gilbert-Frank Corp., 70 N.Y.2d at 969.

SO ORDERED.

/s/
Vincent L. Broderick, U.S.D.J.

Dated: White Plains, New York
April 8, 1991

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

SHEET METAL WORKERS UNION LOCAL 38 INSURANCE AND WELFARE FUND, SHEET METAL WORKERS UNION LOCAL 38 PENSION FUND, SHEET METAL WORKERS UNION LOCAL 38 VACATION FUND, SHEET METAL WORKERS LOCAL 38 ANNUITY FUND, AND WILLIAM R. PAGANO, as participant, beneficiary and trustee of SHEET METAL WORKERS UNION LOCAL 38 INSURANCE AND WELFARE FUND, SHEET METAL WORKERS UNION LOCAL 38 PENSION FUND, SHEET METAL WORKERS UNION LOCAL 38 VACATION FUND, AND SHEET METAL WORKERS UNION LOCAL 38 ANNUITY FUND,

Plaintiffs,

- against -

THE AETNA CASUALTY AND SURETY COMPANY,

Defendant.

89 Civ. 7903(VLB)

ORDER

----------X

THE AETNA CASUALTY AND SURETY COMPANY,

Third-Party Plaintiff,

- against -

MARTIN J. SCHWIMMER,
MARIO RENDA,
JOSEPH DeCARLO, SR. and
FIRST UNITED FUNDS, LTD.,

Third-Party Defendants.

----------X

VINCENT L. BRODERICK, U.S.D.J.

A final judgment shall be entered pursuant to Rule 54(b), Federal Rules of Civil Procedure, in favor of defendant on the basis of my order dated April 8, 1991 granting defendant's motion for summary judgment and denying plaintiffs' motion for partial summary judgment. There is no just reason for delay.

All proceedings with respect to defendant's third-party complaint shall be stayed pending disposition of the

appeal from the Rule 54(b) judgment. The case is placed on the suspense calendar.

SO ORDERED.

Dated: White Plains, New York
~~July~~ [sic]
August 9, 1991

/s/
Vincent L. Broderick, U.S.D.J.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

SHEET METAL WORKERS UNION LOCAL 38 INSURANCE AND WELFARE FUND, SHEET METAL WORKERS UNION LOCAL 38 PENSION FUND, SHEET METAL WORKERS UNION LOCAL 38 VACATION FUND, SHEET METAL WORKERS UNION LOCAL 38 ANNUITY FUND, and WILLIAM R. PAGANO, as participant, beneficiary and trustee of SHEET METAL WORKERS UNION LOCAL 38 INSURANCE AND WELFARE FUND, SHEET METAL WORKERS UNION LOCAL 38 PENSION FUND, SHEET METAL WORKERS UNION LOCAL 38 VACATION FUND, AND SHEET METAL WORKERS UNION LOCAL 38 ANNUITY FUND,

Plaintiffs,

- against -

THE AETNA CASUALTY AND SURETY COMPANY,

Defendant.

89 Civ. 7903 (VLB)

ORDER

----------X

THE AETNA CASUALTY AND SURETY COMPANY,

Third-Party Plaintiff,

- against -

MARTIN J. SCHWIMMER,
MARIO RENDA,
JOSEPH DeCARLO, SR. and
FIRST UNITED FUNDS, LTD.,

Third-Party Defendants.

----------X

VINCENT L. BRODERICK, U.S.D.J.

I vacate my order of July 9, 1991.

I direct that a final judgment be entered in favor of defendant on the basis of my order dated April 8, 1991 that granted defendant's motion for summary judgment and denied plaintiffs' motion for partial summary judgment.

As the defendant's third-party claim is moot, I dismiss the third-party complaint.

SO ORDERED.

/s/
Vincent L. Broderick, U.S.D.J.

Dated: White Plains, New York
October 18, 1991

APPENDIX E

29 U.S.C. provides in relevant part as follows:

29 U.S.C. §1112 Bonding

Every fiduciary of an employee benefit plan and every person who handles funds or other property of such a plan (hereafter in this section referred to as "plan official") shall be bonded as provided in this section;...

.

29 U.S.C. § 1113 Limitations of Actions

No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty or obligation under this part, or with respect to a violation of this part, after the earlier of-

1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

except that in the case of fraud or concealment, such action may be commenced

not later than six years after the date of discovery of such breach or violation.

29 U.S.C. §1451 Civil Actions

(a) Persons entitled to maintain actions

(1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

* * *

(f) Time limitations

An action under this section may not be brought after the later of--

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

New York Civil Practice Law and Rules

(McKinney's) provides as follows:

§201

An action, including one brought in the name or for the benefit of the state, must be commenced within the time specified in this article unless a different time is prescribed by law or a shorter time is prescribed by written agreement. No court shall extend the time limited by law for the commencement of an action.

§213

The following actions must be commenced within six years:

* * *

2. an action upon a contractual obligation or liability, express or implied, except as provided in section two hundred thirteen-a of this article or article 2 of the uniform commercial code or article 36-B of the general business law;